United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

74-2581

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-2581

SAUL STEIN, et al.,

Plaintiffs,

v.

J. FREDERICK BITZER, CHAIRMAN, et al.,

Defendants.

On Appeal from the United States District Court
for the District of Connecticut

BRIEF FOR THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

WILLIAM A. CAREY
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

BEATRICE ROSENBERG
CHARLES L. REISCHEL
SUSAN J. JOHNSON
Attorneys
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Cont'd) PAGES

STATUTES AND OTHER AUTHORITIES (Cont'd) PAGES

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-2581

SAUL STEIN, et al.,

Plaintiffs,

v.

J. FREDERICK BITZER, CHAIRMAN, et al.,

Defendants.

On Appeal from the United States District Court
for the District of Connecticut

BRIEF FOR THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

STATEMENT OF INTEREST

The United States Equal Employment Opportunity Commissio files this brief as amicus curiae in support of appellants solely on the issue of whether the Eleventh Amendment prohibits federal courts from awarding retroactive payments (back pay) in Title VII suits brought against States or

their instrumentalities by private individuals. Should this Court hold that the Eleventh Amendment does constitute such a bar, it would almost certainly affect the informal process of investigation and conciliation which the Commission is statutorily mandated to perform.

QUESTION PRESENTED

Whether the Eleventh Amendment precludes the award of back pay which Congress, pursuant to its authority under Section 5 of the Fourteenth Amendment, has determined to be appropriate to redress employment discrimination by the States.

STATEMENT OF THE CASE

This is an appeal from those portions of a memorandum and order by the Hon. T. Emmet Clarie of the United States District Court for the District of Connecticut dated September 16, 1974, denying retroactive payments and attorney's fees to persons found to have been subjected to discriminatory practices by the State of Connecticut.

The suit was brought as a class action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e et seq. (Supp. II, 1972) by male employees

of the State of Connecticut. The complaint alleged that the state pension plan discriminated against males on the basis of sex in that females were allowed to retire with full pensions earlier than [illegible] equal qualifications. Plaintiffs requested that the Court enjoin further implementation of the allegedly discriminatory system and order the State to set up a non-discriminatory system; they further requested that the Court order the State to make retroactive payments to those males who had retired early under the old system and thus been paid less than females who retired at the same age, and to pay attorney's fees.

The lower court found the system discriminatory and enjoined the State from further implementation of it. The State has not appealed from this portion of the order. However, the Court denied the request for the payment of retroactive pension benefits and attorney's fees on the ground that such relief was precluded by the Eleventh Amendment to the United States Constitution. Having found that any such payments would come from the State treasury and/or tax revenues, and that the State had not waived its immunity, the court held that relief was barred by the Eleventh Amendment, citing Edelman v. Jordan, __U.S.__, 94 S.Ct. 1347 (1974).

ARGUMENT

ACTING PURSUANT TO ITS AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT, CONGRESS HAS DETERMINED THAT BACK PAY AWARDS TO REDRESS STATE EMPLOYMENT DISCRIMINATION ARE APPROPRIATE TO ENFORCE THE FOURTEENTH AMENDMENT; THEREFORE THE ELEVENTH AMENDMENT DOES NOT PRECLUDE SUCH RELIEF.

The lower court held that plaintiffs may not secure the kind of monetary restitution specifically provided for in Title VII of the Civil Rights Act of 1964, as amended,*/ because the States are shielded from liability to the victims of their discriminatory practices by the Eleventh Amendment to the United States Constitution. In support of this position, the lower court relied principally on Edelman v. Jordan, _U.S._, 94 S.Ct. 1347 (1974).

The Commission respectfully submits that, by its own terms, Edelman does not apply to the instant case. Edelman involves an attempt by private plaintiffs to enforce, pursuant

---

*/ The Statutes involved are included as an attachment at the end of the brief.

to 42 U.S.C. §1983,[1] rights granted by other federal legislation. The provisions of §1983, however, do not explicitly authorize suit against the State, but only against those persons acting "under color of State law", such as State officials. And the Court indicated that this is precisely why only prospective injunctive relief is available under §1983, when it said in Edelman at p. 1362:

> But it has not heretofore been suggested that §1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself. (Emphasis supplied)

This is consistent with the general principle articulated in Edelman that the Court will not construe federal legislation to provide for money damages against a state unless "a Congressional enactment. . . by its terms authorize[s] suit by designated [private] plaintiffs against a general class of defendants which literally include[s] States or State instrumentalities." Edelman v. Jordan, supra, 94 S.Ct. at 1360.

1/ This section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

But, as shown below, Congress, acting under Section 5 of the Fourteenth Amendment, clearly has authorized suits directly against the States under Title VII and clearly has provided that monetary relief may be recovered therein. Thus the question in this case—whether under Section 5 Congress has the authority to authorize such relief from the States in order to ensure that the prohibitions of the Fourteenth Amendment are fully effective—simply was not presented in Edelman.[2/]

Under the Fourteenth Amendment, however, it is clear that Congress does have the authority to provide effective relief from State practices which discriminate on the basis of race, sex, national origin, or religion, i.e., precisely the sort of practices at which Title VII is directed.

A. In The Exercise Of Its Authority Under Section 5 of The Fourteenth Amendment, Congress Provided A Private Right Of Action Against The States To Secure Appropriate Monetary Relief.

Prior to 1972, Title VII of the Civil Rights Act of 1964 did not prohibit employment discrimination by the States or

---

2/ The Commission respectfully submits that Rothstein v. Wyman, 467 F.2d 226 (2nd Cir. 1972), cert. denied 411 U.S. 921 (1973) is inapplicable for the same reason. It was also a case regarding welfare legislation which was not passed pursuant to the Fourteenth Amendment and which plaintiffs were seeking to enforce pursuant to Sec. 1983.

their political subdivisions.[3] In 1972, however, Congress amended the Title specifically to provide such coverage,[4] and also amended those provisions of the Title which authorize private actions under the Title to ensure that such actions could be brought against the states and their subdivisions in the federal district courts.[*] At the same time, Congress amended those provisions which specify the remedial powers of the courts under the Title to emphasize that they have the authority to order all forms of equitable relief and to delineate clearly the period for which defendants might be liable for back pay.[5]

3/ Section 701 of the 1964 Act in defining the term "employer" provided that:

> . . . such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof. . .

4/ Section 701 as amended, 42 U.S.C. (Supp. II, 1972) §2000e, provides that:

> . . . such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code)...

5/ Prior to the 1972 amendments, Section 706(g), 42 U.S.C. §2000e-5(g), provided:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice

*/ See Attachments. Cont'd on next page

5/ Continued

charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligency by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

Section 706(g) now provides:

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a). (Emphasis added).

The debates prior to the passage of the 1972 amendments make it clear that Congress intended to allow individual citizens to sue the States in federal district court to end discrimination in employment and to receive complete relief from such discrimination, including both injunctive relief and back pay.

In Report No. 92-415, the Report of the Senate Committee on Labor and Public Welfare attached to the proposed amendments, the Committee stated its belief that employees of State and local governments were entitled to the same protection as employees in the private sector. It stated that the number of persons so employed had grown and continued to grow rapidly, and that there were positive indications that State and local governments had in many cases consciously and overtly discriminated against minority groups in hiring and promotion. The Committee Report cited reports by the U.S. Commission on Civil Rights which found that minority members in general, and particularly Mexican Americans in law enforcement agencies in the Southwest, were excluded and discriminated against by these governmental units.

The Committee Report indicates that Congress believed that it had the power, pursuant to the Fourteenth Amendment, and particularly Section 5, the "enabling" language, to include State and local governmental units within the coverage of Title VII. In the words of the Report:

> The Constitution is imperative in its prohibition of discrimination by State and local governments. The Fourteenth Amendment guarantees equal treatment of all citizens by States and their political subdivisions, and the Supreme Court has reinforced this directive by holding that State action which denies equal protection of the laws to any person, even if only indirectly, is in violation of the Fourteenth Amendment. [Footnote omitted]. It is clear that the guarantee of equal protection must also extend to such direct action as discriminatory employment practices.
>
> * * * *
>
> The inclusion of State and local government employees within the jurisdiction of Title VII guarantees and protections will fulfill the Congressional duty to enact the "appropriate legislation" to insure that all citizens are treated equally in this country. Legislative History of the Equal Employment Opportunity Act of 1972 (1972) at pp. 419-420 (Emphasis supplied).

It is clear that Congress, in enacting the 1972 Amendments, intended to make all of the remedies available in the private sector also available to employees in the public sector. The Senate Committee report states unequivocally that:

> The Committee believes that employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of the economy.

> . . . By amending the present section 701 to include State and local governmental units within the definition of an 'employer' under Title VII, all State and local governmental employees would, under the provisions of the bill, have access to the remedies under the Act. Id., p. 418

Furthermore, Congress emphatically reaffirmed the importance of back pay as an integral part of an effective remedy for victims of discrimination. Thus the Section-by-Section analysis of the 1972 amendments submitted by their Senate sponsor, Senator Williams, states:

> The provisions of [Section 706(g)] are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. Id. at p. 1848 (Emphasis supplied).

Therefore it could not be more apparent that Congress, in the exercise of its authority under Section 5 of the Fourteenth Amendment, determined that, in order to enforce the Amendment, it was essential to provide private parties with the same remedies available against private employers, including the essential remedy of back pay.

B. The Congressional Determination That The Enforcement Of The Fourteenth Amendment Requires That the States Bear The Financial Consequences Of Their Discriminatory Practices Was A Proper Exercise Of The Authority Granted By Section Five Of The Fourteenth Amendment.

Section 5 of the Fourteenth Amendment provides that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Where, as with the 1972 amendments to Title VII, Congress has sought to exercise this authority, the test as to whether or not it has properly done so is: (1) whether the legislation may be viewed as a measure to secure rights protected by the Fourteenth Amendment; (2) whether it is plainly adapted to that end; and (3) whether it is consistent with the letter and spirit of the Constitution. Katzenbach v. Morgan, 384 U.S. 641, 651 (1966). Under these standards,

it is clear that Congress properly exercised its Section 5 authority in subjecting the states to remedies provided in Title VII.

It can no longer be doubted that the Fourteenth Amendment prohibits the states from discriminating on the basis of sex. See, e.g., Reed v. Reed, 404 U.S. 71 (1971). Indeed, in Frontiero v. Richardson, 411 U.S. 677 (1973), a plurality of the Court held that sex, like race and national origin, is a "suspect classification."[6/] Nor can it be doubted that the states may not, under the Fourteenth Amendment, practice invidious discrimination in employment. Sugarman v. Dougall, 413 U.S. 634 (1973); In Re Griffiths, 413 U.S. 717 (1973). Therefore the right to be free from sex discrimination by the State in state employment, secured by Title VII, may be viewed as protected by the Fourteenth Amendment. Cf. Geduldig v. Aiello, U.S. ,

---

6/ Mr. Justice Brennan observed at p. 686:

> "[I]t can hardly be doubted that . . . women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena." (Emphasis supplied).

94 S.Ct. 2485, 2492, n. 20 (1974).

Providing monetary relief for the financial consequences of invidious employment discrimination by the state is not only adapted, but necessary, to ensure that individuals do not suffer from such prohibited conduct. The Courts have repeatedly so held in cases arising under Title VII. See, e.g., Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 720-721 (7th Cir., 1969); Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir., 1971); Head v. Timken Roller Bearing Co., 486 F.2d 870, 876-877 (6th Cir., 1972); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 251-252 (5th Cir., 1974). And, as indicated in the legislative history quoted above at pp. 15-16, Congress specifically recognized as much in enacting the 1972 amendments.

Furthermore, even if such relief were not so clearly necessary to obviate the consequences of unlawful conduct, as the Supreme Court has stated in Katzenbach v. Morgan, supra, 384 U.S. at 653:

> "[I]t was for Congress, as the branch that made this judgment [of the necessity for the legislation], to assess and weigh the various conflicting considerations -- the risk or pervasiveness of the discrimination in government services, the effectiveness of eliminating the

> state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected. . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." (Emphasis supplied).

Finally, such relief is fully consistent with both the letter and spirit of the Constitution. It can not be logically argued that the provision of effective remedies for state conduct in violation of the Fourteenth Amendment would unduly infringe any lawful prerogatives of the States. As the Supreme Court said in Ex Parte Virginia, 100 U.S. 399, 346 (1880):

> The prohibitions of the 14th Amendment are directed to the States, and they are to a degree restrictions of state power. It is these which Congress is empowered to enforce . . . Such enforcement is no invasion of state sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. . . [I]n exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Nor can she deny to the General Government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted.

Furthermore, it could not be more apparent that the conduct for which Congress with this legislation provides redress--discrimination on the basis of race, sex, national origin and religion— constitutes precisely the kind of invidious discrimination which the Fourteenth Amendment was specifically designed to prevent. Protection from such invidious discrimination is at the very core of the Fourteenth Amendment. See, e.g., Shelly v. Kraemer, 334 U.S. 1 (1948); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Frontiero v. Richardson 411 U.S. 677 (1973); Sherbert v. Verner, 377 U.S. 398 (1963). Indeed, no principle is more firmly rooted in our Constitution than that the States shall not effect discrimination on the basis of immutable characteristics such as sex. As the Supreme Court has said in Frontiero v. Richardson, supra, 411 U.S. at 686:

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.... Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

A state has no lawful prerogative which can interfere in any way with effective federal enforcement of such fundamental principles. Thus the Eleventh Amendment could not provide a means for the State to avoid providing all equitable relief, including back pay, which Congress has specifically directed should be available to the victims of invidious discrimination in employment under Title VII.

CONCLUSION

For all the reasons stated herein, the Commission respectfully requests that this Court reverse the lower court's order and grant retroactive payments.

Respectfully submitted,

WILLIAM A. CAREY
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

BEATRICE ROSENBERG
CHARLES L. REISCHEL

SUSAN J. JOHNSON
Attorneys

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506

January 24, 1975
mlf/cyb

A T T A C H M E N T

STATUTES

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Only Sections 1 and 5 of the Fourteenth Amendment are applicable to the instant case. Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Section 5 provides:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 706(f)(1) of Title VII, as amended, 42 U.S.C. (Supp. II, 1972) §2000e-5(f)(1) provides, in pertinent part:

> In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. <u>The person or persons aggrieved shall have the right to intervene in a civil action brought by</u>

> the . . . Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, . . . the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, . . . the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved. . . Upon timely application, the court may, in its discretion, permit the . . . Attorney General in a case involving a government, governmental agency or political subdivision, to intervene in such civil action. . . (Emphasis supplied).

Section 706(f)(3) provides:

> Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. . .

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of the United States Equal Employment Opportunity Commission as Amicus Curiae, have been mailed today, postage prepaid, to the following counsel of record:

Hon. Robert J. Killian
Attorney General
Michael F. Ahern, Esq.
Sidney D. Giber, Esq.
Assistant Attorneys General
for the State of Connecticut
30 Trinity St.
Hartford, Conn. 06115

Paul W. Orth, Esq.
Hoppin, Carey & Powell
Attorneys at Law
266 Pearl St.
Hartford, Conn. 06103

SUSAN J. JOHNSON
Attorney

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506

January 24, 1974